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IN THE
COURT OF APPEALS OF INDIANA

STEPHEN E. KOSCHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0612-CR-586
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0605-FC-112

June 7, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Stephen Koscher ("Koscher") pleaded guilty in Allen Superior Court to one count of Class C felony child exploitation and four counts of Class D felony possession of child pornography. The trial court sentenced him to an aggregate term of five and one-half years with one and one-half years suspended. On appeal, Koscher contends that the trial court overlooked mitigating circumstances and that his sentence is inappropriate in light of the nature of the offense and character of the offender.

We affirm.

Facts and Procedural History

In November 2005, Koscher began communicating on the Internet with individuals and exchanging child pornography with them. On November 26, 2005, he began speaking with an undercover detective who was posing as a fourteen-year-old boy. Koscher sent nude pictures of himself to encourage the fourteen-year-old to photograph himself nude and forward the pictures to Koscher for Internet publication. Upon a search of Koscher's computer, police discovered that Koscher had downloaded and sent child pornography to other individuals on the Internet on multiple occasions in March 2005, November 2005, December 2005, January 2006, and February 2006. Police found several hundred images of child pornography on Koscher's hard drive and on several 3.5 floppy discs.

On May 2, 2006, the State charged Koscher with one count of Class C felony child exploitation, seven counts of Class D felony possession of child pornography and one count of Class D felony attempted dissemination of matter harmful to minors. On September 8, 2006, Koscher pleaded guilty to Class C felony child exploitation and four

counts of Class D felony possession of child pornography. In return, the State agreed to dismiss the four remaining counts.

The trial court conducted a sentencing hearing on November 17, 2006. At the hearing, the trial court found no mitigating circumstances and one aggravating circumstance: that Koscher did not have any intent to secure treatment. The trial court sentenced Koscher to the advisory sentence of four years for the Class C felony and four concurrent terms of one and one-half years for each of the Class D felonies. The trial court ordered Koscher's one-and-one-half year sentences to be suspended. These counts were ordered to run consecutive to Koscher's four-year sentence for child exploitation. Koscher now appeals. Additional facts will be added as necessary.

I. Mitigating Circumstances

Koscher contends that the trial court erroneously failed to consider several mitigating circumstances, and therefore his sentence is inappropriate. Initially, we note that Koscher committed these crimes after our General Assembly amended Indiana Code section 35-38-1-7.1, enacted on April 25, 2005, providing for an advisory sentencing scheme. Under this amended statute, a trial court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d) (2004). Although our supreme court has not yet interpreted the amended statute providing for advisory sentences, the plain language of the statute seems to indicate that under the advisory scheme, "a sentencing court is under no obligation to

find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied.

Consequently, a defendant's claim regarding aggravators and mitigators is no longer separate from a claim that his sentence is inappropriate under Indiana Appellate Rule 7(B). McMahon v. State, 856 N.E.2d 743, 748-749 (Ind. Ct. App. 2006). Rather, as long as a sentence imposed under this new scheme falls within the correct statutory range, we review it under a single standard: inappropriateness. Id. The defendant has the burden to persuade the appellate court that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

In McMahon, we held that we may no longer reverse a sentence only because a trial court abused its discretion in finding and weighing aggravating and mitigating circumstances. 856 N.E.2d at 749. Instead, to reverse a sentence we must find that the sentence is inappropriate under Appellate Rule 7(B). However, such an examination may include a challenge to the aggravating and mitigating circumstances found, or not found, by the trial court under Indiana Code section 35-38-1-7.1. Id. In reviewing the trial court's exercise of discretion in finding and weighing mitigating and aggravating circumstances, we will continue to apply the familiar abuse of discretion standard. Long v. State, 865 N.E.2d 1031, 1036 (Ind. Ct. App. 2007) (citing Leone v. State, 797 N.E.2d 743, 748 (Ind. 2003)).

The determination of mitigating circumstances rests within the sound discretion of the trial court. Weaver v. State, 845 N.E.2d 1066, 1073 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to consider alleged mitigating circumstances that

are highly disputable in nature, weight, or significance. Creekmore v. State, 853 N.E.2d 523 (Ind. Ct. App. 2006). "'Indeed, a sentencing court is under no obligation to find mitigating factors at all.'" Id. (quoting Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied). To support an allegation that the trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating evidence was both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Furthermore, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Koscher contends the trial court erred in failing to find his lack of criminal history as a significant mitigating circumstance. The crimes to which Koscher pleaded guilty involved multiple acts of downloading, sending and soliciting hundreds of images of child pornography over a period of at least four months. That fact in and of itself negates the claim that he is entitled to sentence mitigation because he has heretofore and otherwise lived a law-abiding life. Therefore, the trial court did not err in failing to find Koscher's lack of criminal history as a significant mitigating circumstance.

With respect to Koscher's claim that his guilty plea is entitled to mitigating weight, we observe that a trial court is inherently aware that a guilty plea is a mitigating factor. Francis v. State, 817 N.E.2d 235, 237-238 (Ind. 2004). However, a guilty plea is not necessarily a significant mitigating factor. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). Here, Koscher received a significant benefit from the State in that four Class D felony charges were dismissed. Therefore, although Koscher's plea may have saved

the State the expense of a trial, the trial court would be justified in determining that the decision to plead guilty was to a large extent pragmatic, and thus not entitled to significant mitigating weight.

Koscher also claims the presentence investigation report supports his claim that his cooperation with authorities should have been afforded mitigating weight. Because Koscher has not included the presentence investigation report in the record, he has not met his burden of proving that the mitigating weight of his cooperation is both significant and clearly supported by the record. See Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

Nonetheless, we observe that after obtaining a warrant police found hundreds of child pornographic pictures on Koscher's computer hard drive and 3.5 floppy discs. Because of this evidence, "it would not have been difficult for the police to investigate and determine who was responsible" for this crime. Corcoran v. State, 774 N.E.2d 495, 499-500 (Ind. 2002). Therefore, this factor was not entitled to significant mitigating weight, and the trial court did not abuse its discretion in failing to itemize it as a consideration. See id.

Lastly, Koscher claims the trial court failed to assign mitigating weight to his decision to voluntarily seek treatment and the fact that the presentence investigation report stated that his chances of re-offending would be less likely under continued treatment. Again, our review is hampered by Koscher's failure to include the presentence investigation report. However, Koscher's claim that these mitigating circumstances are both significant and clearly supported by the record necessarily fails due to the

conflicting evidence presented regarding both of these factors. Koscher did not seek treatment until October 2006, after he had pleaded guilty and before he was sentenced. In fact, he did not seek treatment until a month before the sentencing hearing. Given this fact, a trial court could conclude that his decision to seek treatment was a pragmatic maneuver to seek leniency in his sentence rather than an honest attempt at seeking rehabilitation. Importantly, Koscher missed his last appointment, which was to take place four days before the sentencing hearing, further demonstrating his lack of good faith in seeking rehabilitation.

II. Appropriateness of Sentence

Our court may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) (2007). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court. Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003), trans. denied. The burden is on the defendant to persuade us that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

Regarding the character of the offender, the trial court found as an aggravating circumstance that Koscher had "no intent to secure any kind of treatment at this point." Tr. p. 14. This conclusion was based on the fact that Koscher procrastinated in seeking treatment until one month before his sentencing hearing, and that he missed one out of four of his counseling sessions.

Regarding the nature of the offense, Koscher was convicted of five felony charges involving the sexual exploitation of children. His convictions were based upon separate crimes that happened during different periods and resulted in the download and exchange of hundreds of child pornographic images. In addition, Koscher's Class C felony conviction was based on the separate act of soliciting a child to take nude pictures of himself to send to Koscher for Internet publication. "[T]he existence of and traffic in child pornographic images . . . inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials." Pub.L. No. 104-208, § 121, 110 Stat. at 3009-27.

Through his crimes, Koscher has directly contributed to the sexual abuse and victimization of many children. It is also well established that enhanced and consecutive sentences may be necessary to vindicate the fact that there were separate harms and separate acts against more than one person. Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003).

Here, Koscher received the advisory sentence on all counts. Although the trial court ordered his Class C felony to be served consecutive to the Class D felonies, the trial court suspended all four of Koscher's Class D felony sentences to probation. Therefore, Koscher's aggregate sentence is five and a half years with one and one-half years suspended. We cannot say that such a sentence is inappropriate in light of the nature of the offense and character of the offender.

Conclusion

The trial court did not abuse its discretion in failing to find any mitigating circumstances, and Koscher's aggregate sentence of four years executed and one and one-half years suspended is not inappropriate in light of the nature of the offense and character of the offender.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.